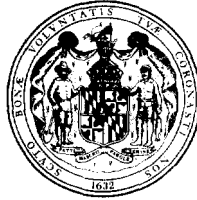


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May 15, 1996

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Federal Communications Commission  
1919 M Street, N.W., Room 222  
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Re: In the matter of Implementation  
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in the Telecommunications Act of  
1996. CC Docket 96-98

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Enclosed for filing are an original and sixteen copies  
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Please distribute a copy to each of the Commissioners.

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Very truly yours,  
\_\_\_\_\_  
Susan Stevens Miller  
Assistant General Counsel

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

IN THE MATTER OF  
IMPLEMENTATION OF THE LOCAL  
COMPETITION PROVISIONS IN  
THE TELECOMMUNICATIONS ACT  
of 1996

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CC DOCKET NO. 96-98

INITIAL COMMENTS OF  
THE MARYLAND PUBLIC SERVICE COMMISSION

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6 St. Paul Street  
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(410) 767-8038  
May 16, 1996

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**IN THE MATTER OF  
IMPLEMENTATION OF THE LOCAL  
COMPETITION PROVISIONS IN  
THE TELECOMMUNICATIONS ACT  
of 1996**

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CC DOCKET NO. 96-98

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**INITIAL COMMENTS OF  
THE MARYLAND PUBLIC SERVICE COMMISSION**

**I. INTRODUCTION**

On April 19, 1996, the Federal Communications Commission (FCC) issued its Notice of Proposed Rulemaking (NPRM) requesting comments on the implementation of the local competition provisions of the Telecommunications Act of 1996 (1996 Act). Specifically, the FCC's NPRM proposes rules to implement portions of Section 251, 252 and 253 of the 1996 Act. The FCC established a comment filing date of May 16, 1996 for all competition issues except dialing parity, number administration, notice of technical changes and access to right of way. This response addresses the scope of the FCC regulations. Through these comments, the Maryland Public Service Commission (MDPSC) submits its recommendations to the FCC concerning Federal-State jurisdictional issues and the unduly prescriptive nature of the NPRM's proposed rules.

## II. Discussion

The FCC has covered a broad range of topics in its NPRM, ranging from the scope of the FCC's authority to the obligations imposed on telecommunications carriers, local exchange carriers (LECs) and incumbent LECs. In interpreting Section 251, the FCC reaches two significant and erroneous conclusions with regard to the scope of its interconnection regulations. First, the FCC suggests that the adoption of explicit national rules would be the most constructive approach to furthering Congress' pro-competitive, deregulatory goals as espoused in the 1996 Act. Second, the FCC concludes as a legal matter that any regulations it issues implementing Sections 251 and 252 apply to both interstate and intrastate aspects of telecommunications services and network elements. This second conclusion literally eviscerates Section 2(b) of the Communications Act of 1934<sup>1</sup> (1934 Act). Both of these conclusions are overly broad, unduly intrusive and violate both the letter and spirit of the 1996 Act. As will be demonstrated below, these conclusions are contrary to the 1996 Act and the Congressional intent which underlies it.

The MDPSC firmly believes that the better choice would be for the FCC to modify its NPRM to establish flexible guidelines which promote the cooperative regulatory paradigms envisioned by Congress when it passed the 1996 Act. Detailed interconnection

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<sup>1</sup> This section, also known as Section 152(b) of the 1934 Act, established state jurisdiction over intrastate communications by wire or radio.

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rules should be developed to apply only to states that have failed to act to implement the new law, or where states opt to adopt the FCC model. Such an approach would preserve a reasonable range of flexibility for states in the arbitration and decision functions contemplated under Sections 251 and 252. By contrast, the FCC's approach creates an unnecessary legal preemption conflict that will cause confusion and delay and will detract from the cooperative and complementary dual regulation intended by the 1996 Act.

The FCC's approach will stifle innovative ideas that exist in the states. A cooperative regulatory paradigm will achieve the 1996 Act's dual regulatory approach by reserving a meaningful and necessary role for the states as the express terms of the 1996 Act require. Also, this approach would preserve the substantial work in promoting local competition already accomplished by states, while ensuring compliance with the 1996 Act and a broader set of FCC guidelines governing interconnection and unbundling. The public interest is best served by allowing a variety of approaches in the initial implementation of the 1996 Act.

**A. The 1996 Act Does Not Compel The  
Adoption of Explicit National  
Rules Which Would Not Allow For  
State Flexibility.**

In the NPRM, the FCC concludes that Congress clearly intended for the FCC "to implement a pro-competitive, deregulatory, national policy framework" under the 1996 Act. NPRM at 26. The FCC suggests that it would proceed "with due regard to work already done by the states" and would formulate an approach that would "preserve broad discretion for states." NPRM at 26-27. However, the FCC goes on to conclude that detailed national uniform rules are contemplated and required under nearly every provision of the 1996 Act.

In particular, the FCC tentatively concludes that it should establish uniform interconnection rules to "facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirement." NPRM at 50. Similarly, the FCC concludes that it should establish national rules for collocation and minimum requirements for unbundling. NPRM at 50, 77. The FCC also asserts that it has authority to establish national requirements for the pricing of interconnection, collocation and unbundling, including the resale requirement for wholesale rates. NPRM at 117. In short, the FCC's approach leaves little discretion or flexibility for the states, yet requires the states to do the "grunt work" by implementing all of these mandates.

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This is not what Congress intended when it passed the 1996 Act. Rather, Congress envisioned a joint federal-state partnership in opening up the telecommunications network to competition. Contrary to this vision, the FCC proposes rigid, detailed rules which not only would constrain those states that have already undertaken to open their local markets but would act as insurmountable barriers to those states on the threshold of opening their markets.

In this regard, the FCC concludes that its approach "would not necessarily undermine initiatives undertaken by various states prior to the enactment of the 1996 Act." NPRM at 19. However, the FCC goes on to say that it will select a particular state's approach to serve as a model or it will select certain parts of several states' approaches to employ a hybrid model. Id. This approach "necessarily undermine[s] the initiatives" taken by all but the selected state. Under the hybrid approach, even the "selected" states will be undermined: only the portions of their decision which survive the FCC's selection process will be permitted to stand and all other aspects of their orders or regulations will have to be altered in order to meet the FCC's rigid requirements. Consequently, such a preemptive approach would set back progress and cause additional delay and regulatory expense.

The FCC's approach would adversely affect initiatives currently underway in Maryland. The MDPSC has long promoted

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competition in the telecommunications industry. Over two years ago, the MDPSC found that it was in the public interest to open local markets to competition. We granted entry to MFS Intelnet of Maryland (MFS-MD) as the first provider of local business service in competition with Bell Atlantic of Maryland (BA-MD). Other carriers were allowed to enter Maryland's market following this decision.

The experience of Maryland and other states demonstrates that the states are capable of addressing the technical issues of local loop unbundling. In Case No. 8584 Phase I, the MDPSC approved, in principle the unbundling of link and local exchange ports.<sup>2</sup> MDPSC's policy is to require unbundling by BA-MD to the extent that the purchase of unbundled elements is requested by a co-carrier, reseller or interconnector and is reasonable and technically feasible without causing damage to network integrity. MDPSC granted MFS-MD authority to provide telephone services on a facility and resale basis in Maryland. BA-MD was required to provide for interconnection with MFS-MD at tandem and central office switches. An interim interconnection rate also was established for when MFS-MD or another LEC hands over to BA-MD a local call for termination on BA-MD's network. MFS-MD was

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<sup>2</sup> In the matter of the Application of MFS Intelnet of Maryland, Inc. for Authority to Provide and Resell Local Exchange and Interexchange Telephone Service; and Requesting the Establishment of Policies and Requirements for the Interconnection of Competing Local Exchange Networks, Order No. 71155 (April 25, 1994). (See Appendix A)

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ordered to file a tariff, with cost support, to establish a termination charge.

The record in Phase I was insufficient to establish prices for links and ports separately. Therefore, decision on this issue was deferred to Phase II of Case No. 8584. On December 28, 1995, the MDPSC issued a comprehensive order establishing the rates, terms and conditions for companies that wish to compete with BA-MD to provide local telephone service to businesses.<sup>3</sup>

Building on our earlier decision that interconnection between carriers is to be permitted at the LEC's access tandem or end offices, depending upon co-carrier preference, the MDPSC set out five generally applicable basic interconnection rules.<sup>4</sup> Also, the MDPSC decided on a termination rate structure designed

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<sup>3</sup> In the Matter of the Application of MFS Intelnet of Maryland, Inc. for Authority to Provide and Resell Local Exchange and Interexchange Telephone Service; and Requesting the Establishment of Policies and Requirements for the Interconnection of Competing Local Exchange Networks, Phase II, Order No 72348 (Dec. 28, 1995) (See Appendix B)

<sup>4</sup> These are: 1) Co-carriers must establish a minimum of one Point of Interconnection (POI) per LEC access tandem serving area when the co-carrier has customers within that serving area. Other carriers must deliver calls to the POI in the access tandem serving area that includes that customer, for termination by the carrier serving that customer. 2) The LEC must establish a minimum of one POI per co-carrier designated traffic aggregation point service area. These traffic aggregation point serving areas will correspond to the LEC's tandem serving area described above. 3) Carriers must offer tandem (or similar aggregation points) and end office interconnection. 4) Each carrier is responsible for delivering its traffic to POIS. The terminating carrier is responsible for routing terminating calls from the POI to the appropriate customers. 5) Carriers mutually may negotiate additional POIS, however, the same interconnection arrangements must be available to all co-carriers under like terms. (Phase II at 71-73)

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to recover mutually and reciprocally the costs to the LEC and co-carriers of terminating one another's local traffic. A two-tiered termination rate structure was established. Local traffic delivered to an access tandem, for which the terminating carrier will incur the cost of tandem switching and transport, would be subject to a higher rate recovering those additional costs; while local traffic delivered to an end office would be subject to a lower termination rate. Phase II at 29-34. Finally, the MDPSC determined that rates for unbundled loops and ports should cover long run incremental costs plus a contribution to the LEC's joint and common costs. Phase II at 36.

The above recitation demonstrates two things. First, the states are entirely capable of addressing and resolving the issues raised concerning interconnection and unbundling. States do not need to have their decision-making authority usurped under the guise of "helping" the states comply with the 1996 Act. Second, the rigid rules proposed by the FCC would definitely undermine the initiatives taken by Maryland. Telecommunications carriers are establishing their businesses based on the principles espoused in the above orders. Any changes in these policies would have a profound, disruptive effect on competition in Maryland. Undoubtedly, Maryland is not alone in this situation.

Finally, the decision in the Phase II order highlights another problem with rigid national rules. In Order No. 72348,

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the MDPSC addressed a unique situation. Callers utilizing BA-MD's system are able to make local calls to nearby District of Columbia and Virginia areas, as the local calling area includes exchanges in all three jurisdictions. Other carriers argued that they would require similar arrangements in order to compete effectively in the Washington Metropolitan Area. The MDPSC resolved this issue by determining that all carriers interconnected in Maryland should be required to treat calls from or on competitor's systems equally to calls placed from or on their own systems. Phase II at 54-58. Rigid, national rules would not resolve this unique local problem and may very well exacerbate the difficulties and lead to less competition rather than more.

Even without regard to the substantial work already accomplished in fostering telecommunications competition in states like Maryland, the 1996 Act contemplates variations in regulatory requirements among states and articulates a clear tolerance for this variance within the confines of promoting competition. Any FCC rules that do not consider the states' technological, economic, geographic and demographic diversity could hamper the states' progress in developing competitive local markets. The more technologically advanced states have fiber optic networks and some states have greater financial resources. States which have major urban areas, large financial centers and major education or research facilities will have a greater demand

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for an advanced network than states which lack those attributes and thus have found that technological advancement is not economically feasible at this point in time. The FCC's simplistic approach fails to recognize the reality of this situation. The states have evolved through different regulatory systems and have developed based on varying needs. Although the 1996 Act does establish the broad parameters and uniform goals for achieving local competition, the FCC seeks to implement the 1996 Act in a way that totally negates the substantial role for the states created by Congress. Congress, through the 1996 Act, did not even contemplate the all-consuming federal paradigm advocated by the FCC.

The MDPSC disagrees with the FCC's conclusion that all Section 251 regulations that the FCC implements should be equally applicable to arbitrated agreements. The FCC regulations should be applicable to arbitrated agreements only if the state commission fails to carry out its responsibilities under Section 252. If the FCC establishes the standards by which arbitration is bound, it will displace the role of the states in conflict with the plain language of the 1996 Act. If Congress had intended for the FCC to bind the states, it would have included language similar to that found in Section 252(f)(2). Since Congress chose not to include such language, the FCC should not bind the states to certain standards in the arbitration process.

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With respect to negotiation and arbitration under Section 252, the FCC suggests that "[b]y narrowing the range of permissible results, concrete national standards would limit the effect of the incumbent's bargaining position on the outcome of the negotiations." NPRM at 32. The effect of this interpretation is to substantially diminish the role for states envisioned in Section 252. Also, this interpretation severely curtails the negotiation process which would otherwise produce a tailored product suited to the particular needs of the carriers involved. After all, the first course of action envisioned by Section 252 is "voluntary negotiations". Congress provided for flexibility and endorsed the same variations which the FCC now is straining to avoid. If all of the terms and conditions are preset, any "negotiations" would be pointless.

Specifically with respect to arbitration, the FCC's stated goal of "narrowing the range of permissible results" diminishes the role for the states. For example, with respect to setting rates for interconnection and unbundling, the FCC's approach unduly restricts the states' authority to "establish any rates for interconnection services or network elements" reserved by Section 252. Congress only limited states' authority for establishing rates by requiring that rates be nondiscriminatory and cost based, while also allowing an element of profit. Sections 252(c)(2) and 252(d)(1).

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Finally, the FCC speculates that states may not complete the timetable for arbitration unless it promulgates specific and rigid rules. NPRM at 33. See, also, NPRM at 219, 238. This argument flies in the face of the recent precedent. Maryland and several other states have proven that they can develop their own standards for interconnection, collocation and unbundling. States have had comprehensive rules in place for some time. Displacing these state regulations will cause the very delay, confusion, uncertainty and unnecessary regulatory conflict which the FCC claims it is trying to avoid. States are entirely capable of defining and applying their own specific standards within the timeframe established by Congress. If the 1996 Act really intended for states merely to apply the FCC's rigidly dictated standards, surely Congress would not have given states a nine month timeframe to process each case.

The MDPSC respectfully submits that the FCC should reconsider its tentative conclusion that the 1996 Act requires broad federal preemption in order to foster competition. The FCC should adopt broad and flexible guidelines so that the states' current progress in planning, establishing and expanding competitive markets is not hampered. The FCC should not adopt detailed rules which would lead to unnecessary problems for states attempting to continue on this path to increased competition. The MDPSC believes that explicit rules will not permit existing state orders and regulations to remain in effect

and would violate Section 251(d)(3) which, as discussed earlier, specifically preserves state access and interconnection regulations and orders.

**B The 1996 Act Cannot Be Read to Call  
For Rigid, Nationally Uniform Rules**

The 1996 Act cannot be read to call for rigid, nationally uniform rules that would restrain an individual state from pursuing an approach to competition that, in its judgment, addresses state specific conditions. The 1996 Act does not compel the adoption of specific prescriptive standards that do not allow for state flexibility. Both Section 2(b) of the 1934 Act and Section 251(d)(3) of the 1996 Act support the conclusion that rules setting forth flexible guidelines to accommodate differing state approaches would be consistent with the intent of Congress as expressed in the 1996 Act, while a rule which severely limits variation among the states violates both the letter and intent of the 1996 Act.

With respect to intrastate versus interstate jurisdictional issues, the FCC concludes that Congress intended Sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service and network elements. NPRM at 27. The FCC carries this conclusion a step too far by theorizing that the FCC's regulations implementing these provisions apply to both interstate and intrastate aspects as well. Id. This conclusion

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would nullify Section 2(b) of the 1934 Act, which is still in full force and effect.

The intrastate exception to FCC authority was not altered by the 1996 Act.<sup>5</sup> Section 2(b) of the 1934 Act was not amended by the 1996 Act and still provides an express limitation on the FCC's jurisdiction that "nothing in this Act shall be construed to apply to give the Commission jurisdiction with respect to: charges, classifications, practices services, facilities or regulations for or in connection with intrastate communications services by wire or radio of any carrier." 47 USC Section 152(b) (Emphasis Added). By its terms, this provision removes intrastate matters from the FCC's reach, resulting in the dual regulatory system we know today.

The FCC's legal rationale regarding this threshold jurisdictional issue is that it "makes little sense" to recognize a distinction between interstate and intrastate interconnection. Therefore, the 1996 Act could not have intended to do so. NPRM at 37. The FCC finds, without offering any legal support, that Congress intended for Section 251 to take precedence over any contrary implications in Section 2(b). However, the 1996 Act does not preclude the dual regulatory system but affirms it. In reviewing the 1996 Act, it is clear that no such prescriptive effect was intended.

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<sup>5</sup> It should be noted that the traditional "interstate" limitation of the FCC also remains unchanged by the 1996 Act. 47 USC Section 151(b)

The FCC's tentative conclusions amount to preemption without a showing of Congressional intent. The critical question in any preemption analysis is always "whether Congress intended that federal regulation supersede state law." Louisiana Public Service Commission v. FCC, 476 US 335, 369 (1986) (Emphasis Added). The view that states have little or no discretion in the application of federal standards represents an attempt to rewrite the legislation and remove Section 2(b) from the Telecommunications Law. This preemptive approach is wholly inconsistent with Congressional intent and legislative history. With respect to the FCC's finding of a broad preemptive intent on the part of Congress, the 1996 Act generally repudiates the approach taken by the FCC. Furthermore, the 1996 Act is quite clear in preempting states where it intended to do so, and no clear expression of preemption is contained in Section 251.

Nothing in the 1996 Act or in the Joint Conference Statement supports the FCC's conclusion that its regulations apply to intrastate as well as interstate aspects of interconnection, service and network elements. Congress was fully aware of the existence of Section 2(b) when it passed the 1996 Act and could have expressly granted the FCC intrastate jurisdiction but chose not to do so. As a matter of fact, the Joint Explanatory Statement of the Committee of Conferences (Explanatory Statement) supports the opposite conclusion. The Explanatory Statement summarizes Section 251(d):

New Section 251(d) requires the Commission to adopt regulations to implement new Section 251 within 6 months, and states that nothing precludes the enforcement of State regulations that are consistent with the requirements of new Section 251. Id. at 122 (Emphasis Added)

Other legislative history also supports the conclusion that Congress did not intend to grant the FCC broad preemptive authority. Originally, both HR 1555 and S.652 contained a revision of Section 2(b) which would have altered state authority. See, S.652 Rep. No. 104-230 at 78; and HR 1555 Rep. No. 104-204 at 53. However, the final version of the 1996 Act did not contain this amendment. Statutory construction principles place great weight on the fact that Section 2(b), at one point, was amended by this legislation but was ultimately restored to its full effect. Yet, the FCC ignores this restoration. Contrary to the FCC's conclusion, these actions would seem to indicate that Congress considered whether FCC regulations should apply to both interstate and intrastate aspects of interconnection agreements and decided that they should not apply to both. In view of this decision, Congress clearly intended a meaningful state role. Thus, the 1996 Act preserves Section 2(b) and the states' exclusive authority over intrastate telecommunications.

In Louisiana, the Supreme Court held that there is no merit to the argument that Section 2(b) does not control because the

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plant involved was used interchangeably to provide both intrastate and interstate service. In that case, petitioners argued that the plain and unambiguous language of Section 2(b) denies the FCC power to compel the states to employ the FCC's established depreciation practices and schedules in connection with the setting of intrastate rates. In reaching its conclusion, the Court stated:

Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law and when there is an actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible and where there is implicit in federal laws a barrier to state regulation.

The Supreme Court then made two conclusions applicable to the FCC's current attempt to preempt state authority. First, the Court found that the FCC could not take preemptive action to advance a broad federal policy where the effect is to disregard Section 2(b)'s express jurisdictional limitation. Louisiana, 476 US at 374-375. Applying this finding to the present situation, it is clear that the FCC cannot rely upon the broad Congressional intent to promote competition to support its conclusion that it has authority to preempt states. Second, the Louisiana Court found that Congress had established a dual regulatory system in the communications arena. The 1996 Act reinforces this dual system, it does not negate it.

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The provisions of the 1996 Act allowing for variations among the states and preserving many existing state requirements raise questions regarding the FCC's authority to impose overly rigid national rules even if there were sound policy reasons for doing so. The 1996 Act does not embody a federal regulatory scheme that is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta, 458 US 141, 153, 102 SCT 3014, 73 LE 2d 564 (1982). As previously noted, it is more reasonable to infer that Congress specifically left room for the states to supplement the federal scheme since Congress expressly allowed state regulation to supplement, and in some cases even supersede, federal regulation. The statutory language is replete with references to state authority.

Second, since Congress left so much to state regulatory authority, compliance with state and federal regulation is not a physical impossibility which would support a claim of implied preemption. Florida Lime & Avocado Growers Inc. v. Paul, 373 US 132, 142-43, 83 SC 1210, 10 Led 2d 248 (1963). Thus, the 1996 Act cannot be found to impliedly preempt state regulation. The FCC appears intent on preempting the states with the rules it will adopt to implement Section 251. A federal agency acting within the scope of its Congressionally delegated authority may preempt state regulation if, but only if, the preemption is reasonably authorized and consistent with the underlying statute.

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De la Cuesta, 458 US at 153-154. While the FCC has authority to adopt regulations under the 1996 Act, if those regulations overly restrict the flexibility of the states, the regulations would be unauthorized and inconsistent with the underlying statute because of the regulatory authority left to the states under the 1996 Act.

The Supreme Court has held that broad Congressional grants of power can provide federal agencies the authority to adopt regulations preempting state law. For example, in De la Cuesta, Congress provided that the Federal Home Loan Bank (Board) was "authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation" of federal savings and loan associations. The Supreme Court found that the Board properly preempted state restrictions on due-on-sale practices. De la Cuesta, 458 US at 160. The Court held that the statutory language placed no limits on the Board's authority to regulate the lending practices of federal savings and loans. Id at 161.

Section 251(d)(1) contains no similar broad mandate. Congress granted the FCC authority "to establish regulations to implement the requirements of this section." Not only is this limited grant of rulemaking authority in stark contrast to the broad grant in De la Cuesta, but it also must be read in conjunction with the other provisions of Section 251. Preemptive national standards would be inconsistent with the explicit

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Congressional acknowledgment contained in Section 251(d)(3), and other provisions of the 1996 Act discussed throughout these comments, that a variety of state regulatory approaches to interconnection and access are permitted. The "best way to determine whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." Louisiana, at 374. In the present situation, Congress simply has not granted the FCC authority to adopt this overly rigid scheme of national regulations which would preempt state initiatives that are consistent with the 1996 Act.

In the past, Congress has made its intention to preempt the states in telecommunication matters abundantly clear. For example, in the Omnibus Reconciliation Budget Act of 1993 (OBRA), Congress made plain that it was preempting state regulation of the rates charged by mobile service providers. OBRA §332(c)(3)(4). The FCC attempted to distinguish the 1996 Act from OBRA by asserting that while Congress saw a need to amend Section 2(b) in the context of preempting state regulation of cellular rates it did not see a corresponding need in enacting Sections 251 and 252 because the FCC's authority under the 1996 Act does not effect end-user rate regulation. NPRM at 40.

The FCC's argument does not support the conclusion that it has exclusive authority over wholesale matters. In fact, the

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1993 amendments of 47 USC §332 clearly reserve to states the authority to regulate "other terms and conditions" including the responsibility of ensuring wholesale spectrum capacity for cellular resellers. H.R. Rep. No. 111, 103rd Cong., 1st Sess. 1 (1993).

Most important, the implied preemption approach advocated in the NPRM is directly prohibited by Congress. Section 601(c) of the 1996 Act clarifies that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Acts or amendments." Through enactment of Section 601(c), Congress has mandated that any preemption finding made under Title 47 should be based on express provisions. Congress was explicit when it intended to eliminate variations among the states in those areas where it found that uniform national approach was required. However, Congress did not endorse Section 251 rules that overrode either Section 2(b) or Section 252. Through Section 601(c), Congress very specifically emphasized that preemptive intent should not be implied based upon corollary provisions or by inference. By contrast and inconsistent with this explicit Congressional directive, the FCC's conclusions regarding preemption are based solely on inference and implication.

In addition to this firmly stated prohibition against implied preemption, Congress expressly crafted a "savings clause" applicable to state regulations, orders or policies relating to

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access and inter connection requirements of LECs, provided that the State requirement is consistent with the requirements of Section 251 and does not substantially prevent implementation of this section.<sup>6</sup> Section 251(d)(3) of the 1996 Act. There is no requirement that the state commission's order, rule, or policy be consistent with any FCC regulations. This omission is an unambiguous indication of Congressional intent to maintain the states' authority to implement their own access and interconnection arrangements subject to the three statutory conditions. In enacting Section 251(d)(3), Congress established the only preemption the FCC may exercise. This statutory language requires the FCC to fashion its regulations to avoid precluding state interconnection policy or rules. Pursuant to Section 251(d)(3), the requirements of Section 251 are supposed to be the measure against which state access and interconnection requirements stand or fall, and should not be supplanted by the FCC substituting its detailed judgment for the states. The approach taken by the FCC fails to give meaning to the state deference mandated by Congress.

The Supreme Court in Louisiana, placed limits on a state's authority over intrastate competition only in situations where the state's exercise of that authority negates the FCC's exercise of its own lawful authority over interstate communications. 476

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<sup>6</sup> The FCC reference to this important savings clause is contained in its discussion of pricing principles. NPRM at 157.

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US at 375-76, n.4. The FCC presents no facts to demonstrate that a state's regulation of the intrastate aspects of interconnection, service and network elements would negate the FCC's regulations. Moreover, the 1996 Act, by reinforcing important roles for states to play in overseeing the terms and conditions of interconnection, codifies the collaborative federal-state approach to regulation. Thus, the Act implicitly recognizes that the states' role in approving or rejecting interconnection agreements does not negate federal policy or interest. In addition, the 1996 Act preserves the state's right to regulate other terms and conditions of interconnection.

The FCC dismisses Section 2(b)'s compelling jurisdictional limitation by concluding that Section 251 takes precedence by "squarely addressing therein the issues before us." NPRM at 39. However, this statement is inaccurate because there is simply no mention of intrastate services or preemption of states' authority over such matters in Section 251. In an attempt to support this erroneous conclusion, the FCC reasons that "[b]ecause the statute explicitly contemplates that the states are to follow the Commission's rules, and because the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its Section 252